LITTLE BLUE BOOK NO. 1346
Edited by E. Haldeman-Julius

Religion's Blight on American Divorce Laws

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HALDEMAN-JULIUS PUBLICATIONS
GIRARD, KANSAS

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PRINTED IN THE UNITED STATES OF AMERICA

CONTENTS

		Page
I.	A Priestly Heritage	5
II.	Christian Sex and Marriage Doctrines	12
III.	Ecclesiastical Courts and Canon Law	23
IV.	American Courts and Churchly Precedents	41
V.	Minds in Subjection	61

RELIGION'S BLIGHT ON AMERICAN DIVORCE LAW

CHAPTER I

A PRIESTLY HERITAGE

Whenever and wheresoever men think, they accept datum points. There are premises they do not examine. There are postulates behind which they do not go.

The conclusions they reach, then, depend upon the accuracy with which the datum points were set, the soundness of the premises, and the validity of the postulates. And one can judge their conclusions only as one first knows and judges their datum points, their premises, and their postulates.

There are six different groups of men and women in America to whom these remarks are intended specifically to apply. They have to do with, and presumably think about, the subject of divorce. In their different ways they assume to speak with authority; and so long have their words been received unchallenged that few among the common folk now pause to doubt or question. Yet the problems

of marriage and divorce that confront us will never be solved until we ask by what warrant they speak and until we test the premises and postulates from which they reason.

Of these groups the clergy is the loudest and most vehement. With reference to this subject the preachers are our perennial and ubiquitous Cassandras. When other subjects fail, the latest figures of the census bureau or the current stories in the tabloids always suffice for a sermon full of dismal foreboding and a sensational headline in Monday's newspaper.

But what are their datum points, their premises, and their postulates?

Invariably they assume that marriage is somehow something not simply natural and human but something mystical, spiritual, and divine. Invariably, too, they assume that divorce is always and under all circumstances an evil, that a high divorce rate is evidence of individual and social degradation, and that a law permitting easy divorce is a menace to civilization.

But whence come these assumptions?

Have the gentlemen in the pulpit ever made a scientific study of the subject? Have they facts and figures justifying the premises from which they argue? Have they ever struck a

balance sheet showing that divorce is an evil either for the individual or for society? Do they even know what is an evil?

Of course, the answer is that they are speaking theologically—that they are simply reiterating the words, arguments, and doctrines used by their clan since and before this nation was born. Here and there the theme is newly dressed; and occasionally there are preachers who make a great show of being modern and scientific-minded. But the truth is that the thoughts they think were thought for them in the Europe of the Middle Ages, and that the doctrines they preach had their genesis in the minds of the early Church Fathers. Being preachers, they have the preacher background and the preacher tradition. Therefore, so far as this subject is concerned, they question not because, as they see it, the datum points have been set. They mislead a people, but they are themselves misled, being the victims of their theological descent.

But unfortunately they are leaders. Wherefore we pay the price of their intellectual subjection.

Two other groups of teachers and shapers of public opinion are the editors and writers on the one hand and the organized women's

clubs on the other. Their assumptions are the same as those of the preachers. In fact, naturally enough, too, most of them simply echo the ideas emanating from the pulpit. For, after all, the intangible influence of centuries of unquestioned acceptance of the theological point of view is almost overwhelming. Their opinions are determined by their milieu.

So far, then, as these three groups are concerned, there is no chance for a solution of our matrimonial problems as things now are, for they have an approach that is wholly wrong. They are handicapped by a priest-made psychology.

The next three groups particularly concerned with the problems growing out of domestic relations are the legislators, the lawyers, and the judges. But these, too, unfortunately are enchained by the same priest-made doctrines and dogmas. They are not free to consider the divorce problem rationally. They are likewise the subjects of a medieval intellectual past. The laws they enact or interpret and apply are of ancient theological lineage, for the legal rules and principles by which they are moved today are the rules and principles evolved in the ecclesiastical courts of England and the Continent many centuries ago. They are Chris-

tian rules and principles; and they are a controlling part of American divorce law at this present moment.

"The influence of Christianity," says one of the leading legal authorities, "has been felt in modern Europe, spreading to England, whence, too, it was brought to the wilds of America, *the Christian rule ever shaping the policy of government.*"

"Modern divorce laws in the United States," writes another, "have developed in the various state jurisdictions out of the application of American social and religious conceptions and theories to the Jewish and Ecclesiastical law of family relations."

And the Supreme Court of Illinois went on record with this statement:

> The well-being of society, the interest of the children of the marriage, good morals, and *the precepts of religion*, all forbid that the marriage contract should be dissolved——.

It should be obvious, then, that there is little chance for a solution of our problems regarding marriage and divorce at the hands of the last three groups mentioned above. The courts are bound by precedents of ecclesiastical origin. The lawyers are interested mainly in the law as it is. And the lawmakers are handicapped either as lawyers with the legal atti-

tude, or else as members of that great general public whose opinions are those of the first three groups or determined by them.

And, of course, there is no ground for hope so far as the first three groups are concerned. They are too thoroughly fettered.

There is, however, a seventh group to whom we may look with some degree of optimism, namely, the sociologists. They at any rate approach the subject with a scientific attitude. But they can make little progress until the pre-conceptions of the other groups are broken down. Theological assumptions must be destroyed, and prejudice overcome. Priest-begotten ideas must be discarded.

In short the American people will never even approach the solution of the vital problems connected with the subject of marriage and divorce until all ecclesiastical fetters are stricken off our thinking and off our jurisprudence. The sociological attitude must take the place of the theological. The blight of religion must be removed from our divorce law.

But before this can be accomplished men and women of progressive minds must first themselves be made to realize that this blight in fact exists. They must be made to understand that modern law is the bastard off-spring

of medieval theology. They must be made to see the disastrous results in unhappiness, immorality, and contempt for judicial processes when society permits justice to remain in ward to religion.

To that end, as a step towards knowledge and freedom, there follows the story of how ecclesiasticism got into American law and some specific evidence regarding its present-day operation and effect.

CHAPTER II

CHRISTIAN SEX AND MARRIAGE DOCTRINES

Christianity was born in a Jewish corner of the Roman world. In matters of sex, therefore, as in other regards, its heritage was Jewish; and as a consequence our sex code is largely that of the ancient Jews as modified by the interpretations and teachings of Jesus, Paul and the Church Fathers, influenced, somewhat, in spite of official Christian condemnation, by superior Roman practices stubbornly adhered to by the people at large, and later by barbarous Germanic practices imposed from without.

To understand, then, what we now have, we need to inquire first what the Jews had at the time Christianity was founded; and a few scriptural quotations will give us at least a partial answer:

> 16. Unto the woman he said, I will greatly multiply thy sorrow and thy conception; in sorrow thou shalt bring forth children; and thy desire shall be to thy husband, and he shall rule over thee. *Genesis iii.*

That is specific enough. It was her punish-

ment for sin. The woman was made subordinate to the man. He was her master.

2. Speak unto the children of Israel, saying, If a woman have conceived seed, and borne a man child: then she shall be unclean seven days; according to the days of the separation for her infirmity shall she be unclean.

4. And she shall then continue in the blood of her purifying three and thirty days; she shall touch no hallowed thing, nor come into the sanctuary, until the days of her purifying be fulfilled.

5. But if she bear a maid child, then she shall be unclean two weeks, as in her separation; and she shall continue in the blood of her purifying three score and six days. *Leviticus xii.*

"Unclean!" For thirty-three days after she had borne a man child—sixty-six in case of a maid child! Sin and degradation!

7. And if a man sell his daughter to be a maidservant, she shall not go out as the menservants do.

8. If she please not her master, who hath betrothed her to himself, then shall he let her be redeemed: to sell her into a strange nation he shall have no power, seeing he hath dealt deceitfully with her. *Exodus xxi.*

20. And Jacob served seven years for Rachel; and they seemed unto him but a few days, for the love he had for her.

25. And it came to pass, that in the morning, behold, it was Leah: and he said to Laban, What is this thou hast done unto me? did not I serve with thee for Rachel? wherefore then hast thou beguiled me?

27. Fulfil her week, and we will give thee this also for the service which thou shall serve with me yet seven other years.

28. And Jacob did so, and fulfilled her week; and he gave him Rachel his daughter to wife also. *Genesis xxix.*

That is to say, the woman was not merely a subject. She was property as well, belonging first to her father, who might even sell her into slavery, and then to her husband, who acquired her by purchase.

3. If a woman also vow a vow unto the Lord, and bind herself by a bond, being in her father's house in her youth;

4. And her father hear her vow, and her bond wherewith she hath bound her soul, and her father shall hold his peace at her; then all her vows shall stand, and every bond wherewith she hath bound her soul shall stand.

5. But if her father disallow her in the day that he heareth; not any of her vows, or of her bonds wherewith she hath bound her soul, shall stand: and the Lord shall forgive her, because her father disallowed her.

6. And if she had at all an husband, when she vowed, or uttered ought of her lips, wherewith she bound her soul;

7. And her husband heard it, and held his peace at her in the day that he heard it: then her vows shall stand, and the bonds wherewith she bound her soul shall stand.

8. But if her husband disallowed her on the day that he heard it; then he shall make the vow which she vowed, and that which she uttered with her lips, wherewith she bound her soul, of none effect: and the Lord shall forgive her. *Numbers xxx.*

She was not even an individual. Her personality was merged in that of her father or her husband.

28. And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it; and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth. *Genesis i.*

1. And God blessed Noah and his sons, and said unto them, Be fruitful, and multiply, and replenish the earth. *Genesis ix.*

8. And Judah said unto Onan, Go in unto thy brother's wife, and marry her, and raise up seed to thy brother.

9. And Onan knew that the seed should not be his; and it came to pass, when he went in unto his brother's wife, that he spilled it on the ground, lest that he should give seed to his brother.

10. And the thing which he did displeased the Lord: wherefore he slew him also. *Genesis xxxviii.*

1. Now Sarai Abram's wife bare him no children: and she had an handmaid, an Egyptian, whose name was Hagar.

And Sarai said unto Abram, Behold now, the Lord hath restrained me from bearing: I pray thee, go in unto my maid; it may be that I may obtain children by her. And Abram hearkened to the voice of Sarai.

3. And Sarai Abram's wife took Hagar her maid the Egyptian, after Abram had dwelt ten years in the land of Canaan, and gave her to her husband Abram to be his wife. *Genesis xvi.*

The object of marriage was children; and, when the wife was sterile, so important was the continuance of the family line, that she might even resort to the devious route of a child by proxy. Where a man died childless, it was his brother's duty to continue his line by marrying his widow. Birth control was against public policy and an abhorrent sin.

1. When a man hath taken a wife, and married her, and it come to pass that she find no favor in his eyes, because he hath found some uncleanness in her: then let him write her a bill of divorcement, and give it in her hand, and send her out of his house. *Deuteronomy xxiv.*

15. Therefore take heed to your spirit, and let none deal treacherously against the wife of his youth,

16. For the Lord, the God of Israel, saith that he hateth putting away. *Malachi ii.*

This last quotation is sometimes cited as evidence that the Jews progressed to a stage where all divorce was condemned; but the fact is that the prophet who uttered these words was using the expression "putting away" figuratively as relating to Yawveh's pet people, and their disloyalty to him "for Judah hath profaned the holiness of the Lord which he loved, and hath married the daughter of a strange god." (v. 11.)

Nevertheless, for some centuries one school of Rabbinical interpreters clung to these words as authority for the contention that all divorce was contrary to the will of the Lord; and they have had their influence ever since.

But the main division of opinion among the commentators arose over the passage from Deuteronomy. Some of them contended that anything in the wife that "found not favor in his eyes" gave the husband the right to divorce her. Others took the position that the word "uncleanness" must be interpreted to mean that the husband's right was limited to cases of adultery. This difference of opinion has come down to our own time.

One thing, however, is clear, namely, that it was for centuries the practice among the Jews for a husband to "repudiate" his wife if and when he felt like it. Since it was also the accepted practice for a man to have more than one wife and concubines as his circumstances permitted, it was, to be sure, possible for him to find solace, when a wife proved unsatisfactory, without divorcing her. But, if he chose to do so, she had no protection, and there was no one to say the husband, "Nay." "Putting her away" was, therefore, a common practice. She, of course, had no rights of a corresponding nature. She was not even a person.

During the centuries immediately preceding the birth of Christianity, there was some relaxation of the old rules through Greek and Roman influence, and there began to be some recognition of women's rights; but little was conceded to a wife that was not conceded to a female slave.

This, then, is the sum and substance of the matter: The Jewish sexual and marriage code in which the Christian code had its roots was one wherein woman was of low estate. Her duty was procreation, and even in performing that duty she was "unclean." She was a chat-

tel, without personality. She was always owned but owned nothing. Her husband could divorce her whenever he wished, but she could not divorce him at all. He could have other wives or find joy in concubines. If she ventured outside the house, her portion was death. It was, in short, the code of a primitive, nomad people, unsoftened even by contact with the more civilized Babylonians. And it was sacred —stamped with the name of Moses, Servant of Yawveh and Law-Giver!

With Jesus and After.

All this, Jesus, as a Jew, subscribed to. Nowhere did he speak one word in behalf of woman or her emancipation. Again and again he recognized the binding force of the laws of Moses, though at times he dissented from those who interpreted them too rigidly. On the subject under discussion here, his reputed statements are contradictory, reflecting the several Rabbinical schools of the time. Regardless, however, of their authenticity, the doctrines there imputed to him have been potent throughout the centuries and still cast their shadow over American life and American law.

They need to be recalled:

31. It hath been said, Whosoever shall put away his wife, let him give her a writing of divorcement:

32. But I say unto you, That whosoever shall put away his wife, saving for the cause of fornication, causeth her to commit adultery: and whosoever shall marry her that is divorced committeth adultery. *Matthew v.*

2. And the Pharisees came to him, and asked him, Is it lawful for a man to put away his wife? tempting him.

3. And he answered and said unto them, What did Moses command you?

4. And they said, Moses suffered to write a bill of divorcement, and put her away.

5. And Jesus answered and said unto them, For the hardness of your heart he wrote you this precept.

6. But from the beginning of the creation God made them male and female.

7. For this cause shall a man leave his father and mother, and cleave to his wife;

8. And they twain shall be one flesh: so they are no more twain, but one flesh.

9. What therefore God hath joined together, let no man put asunder.

10. And in the house his disciples asked him again of the same matter.

11. And he saith unto them, Whosoever shall put away his wife, and marry another, committeth adultery against her.

12. And if a woman shall put away her husband, and he marry another, she committeth adultery. *Mark x.*

These conflicting views of Jesus need to be supplemented with those of St. Paul. While so much scripture may bore the reader, it is important that the exact basic teachings of the various authorities shall be kept in mind. Hence, the following:

2. For the woman who hath an husband is bound by the law to her husband so long as he

liveth; but if the husband be dead, she is loosed from the law of her husband.

3. So then if, while her husband liveth, she be married to another man, she shall be called an adulteress: but if her husband be dead, she is free from the law; so that she is no adulteress, though she be married to another man. *Romans vii.*

1. Now concerning the things whereof ye wrote unto me: It is good for a man not to touch a woman.

2. Nevertheless, to avoid fornication, let every man have his own wife, and let every woman have her own husband.

8. I say therefore to the unmarried and widows, It is good for them if they abide even as I.

9. But if they cannot contain, let them marry: for it is better to marry than to burn.

10. And unto the married I command, yet not I, but the Lord, Let not the wife depart from her husband;

11. But if she depart let her remain unmarried, or be reconciled to her husband: and let not the husband put away his wife.

12. But to the rest speak I, not the Lord: If any brother has a wife that believeth not, and she be pleased to dwell with him, let him not put her away.

13. And the woman which has an husband that believeth not, and he be pleased to dwell with her, let her not leave him.

15. But if the unbelieving depart, let him depart. A brother or a sister is not under bondage in such cases: But God has called us to peace.

27. Art thou bound unto a wife? seek not to be loosed. Art thou loose from a wife? seek not a wife.

28. But and if thou marry, thou hast not sinned; and if a virgin marry, she hath not sinned. Nevertheless such shall have trouble in the flesh: but I spare you.

29. But this I say, brethern, the time is short:

it remaineth, that both they that have wives be as though they had none;

32. But I would have you without carefulness. He that is unmarried careth for the things that belong to the Lord, how he may please the Lord:

33. But he that is married careth for the things of the world, how he may please his wife.

34. There is a difference also between a wife and a virgin. The unmarried woman careth for the things of the Lord, that she may be holy both in body and spirit: but she that is married careth for the things of this world, how she may please her husband.

38. So then he that giveth her in marriage doeth well; but he that giveth her not in marriage doeth better.

39. The wife is bound by the law as long as her husband liveth; but if her husband is dead, she is at liberty to be married to whom she will; only in the Lord. *I Corinthians vii.*

22. Wives submit yourselves unto your husbands, as unto the Lord. *Ephesians v.*

9. In like manner also, that women adorn themselves in modest apparel, with shamefacedness and sobriety; not with braided hair, or gold, or pearls, or costly array;

11. Let the woman learn in silence with all subjection.

12. But I suffer not a woman to teach, nor to usurp authority over the man, but to be in silence. *I Timothy ii.*

Now, when we put the words of Paul with those credited to Jesus, as quoted above, and analyze them, we see that they serve to give sacred authority for the following, not always consistent, doctrines:

(1) *Woman is inferior to man, subject to him, and must "submit" herself to him.*

(2) *The believer's concern should be, not with the things of this world, but with "the things that belong to the Lord." For "the time is short," referring to the belief in the early second coming of Christ.*

(3) *Continence was the most desirable virtue.*

(4) *Marriage was permissible only because "it is better to marry than to burn."*

(5) *Once married, according to one point of view, no divorce at all was allowed. According to another, it might be allowed for adultery only, though Paul made the additional provision that if a believer was married to an unbeliever and the latter "departed," the former was no longer under "bondage."*

(6) *A divorced person should not be permitted to marry again, at least not while the former spouse lived.*

(7) *Women should "adorn themselves in modest raiment."*

(8) *Women should not be permitted to teach, nor to usurp authority over the men, but "to be in silence."*

As will appear later, all these doctrines have at all times since received the official approval of some or of all of the branches of Christendom; and they permeate our present thinking

and particularly the thing with which we are here concerned, to-wit: American law relating to sex, marriage and divorce.

To prove this and to make clear the blighting influence of Christianity in American jurisprudence, it is necessary to trace further the development of Christian doctrine regarding these subjects.

But there is one thing implicit in the teachings of Paul and in those of the Fathers, now to be referred to, that the reader needs ever to bear in mind, namely, that Christianity was not interested in conditions of this world, that its teachings were not based on any sociological point of view, and that its only object was to save souls. Social and humanitarian interests were not considered.

The following quotations will help the reader to understand how the Fathers viewed the subjects under discussion, though it must be conceded that there were others who held divergent views, which the Church however eventually rejected:

Woman—

The sentence of God on this sex of yours lives in this age. You are the Devil's gateway. You destroy God's image, Man. *Tertullian* (Lived about 160-230).

A necessary evil, a natural temptation, a desirable calamity, a domestic peril, a deadly fascination, and a painted ill. *Chrysostom* (347?-407).

Let her be entirely covered, unless she happens to be at home.—For this is the wish of the Word, since it is becoming to her to pray veiled. *Clement.* (150-220).

It is not right in God that a faithful Christian woman should be adorned. *Commodian.*

Let your countenance remain in you incorrupt, your head unadorned, your figure simple; let not wounds be in your ears, nor let the precious chain of bracelets and necklaces circle your arms and neck; let your feet be free from golden bands, your hair stained with no dye, your eyes worthy of beholding God. *Cyprian* (220-258).

No Divorce—

As long as her husband lives, although he be an adulterer, a Sodomite, a man loaded with every crime, and on that account abandoned by his wife, he is her husband, and she cannot marry another. *Jerome* (340-420).

Undoubtedly it belongs to the essence of this sacrament that, when man and wife are once united by marriage, this bond remains indissoluble during their lives. As long as both live, there remains a something attached to the marriage which neither mutual consent nor union with a third person can remove. *Augustine* (420?).

Second Marriage Condemned—

A man who marries a divorced woman is guilty of adultery. *Justin* (103-167).

Our rule is that each must remain as he is born, or be content with a single marriage. Second marriages are nothing but decorously disguised adultery. *Athenagoras* (177 A. D.)

Chastity, the Ideal—

Blessed is the man who soils not the divine image within him with the filth of concupiscence. *Gregory* (328-389).

So much for the words of the Christian Fathers! The evil effects that such views had on the place and position of woman, on mar-

riage, and on sex problems in general is admitted even by Christian writers. Thus one finds the author of the article on "Marriage" in Smith and Cheetham's "Dictionary of Christian Antiquities" saying:

> We cannot but notice, even in the greatest of the Christian Fathers a lamentably low estimate of women, and consequently the marriage relationship. Even St. Augustine can see no justification for marriage, except in a grave desire deliberately adopted of having children; and in accordance with this view, all married intercourse except for this purpose is harshly condemned. If marriage is sought after for the sake of children, it is justifiable; if entered into as a remedium to avoid worse evils, it is pardonable; the idea of the mutual society, help and comfort that one ought to have of the other, both in prosperity and adversity, hardly existed, and could hardly exist.

James Donaldson, the author of a searching work on "Woman," understanding how the ideas of the Fathers degraded the conception of her, wrote:

> I may define man as a male human being and woman as a female human being.—Now, what the early Christians did was to strike the male out of the definition of man, and human being out of the definition of woman.

We cannot trace here in detail, of course, the subsequent date of these doctrines. But never for a moment did the Christian leaders waiver in their purpose to bring Europe under their domination. There were dissenters from time to time, but they were overcome and left dying beside the road. And from the day when Con-

stantine entered into his coalition with the Bishops and brought about a partnership between the Church and the State, between the cross and the sword, all the resources thus made available were used unscrupulously to establish these doctrines, not merely as canons of the Church but as laws of the State.

In the beginning the Church had nothing to do with marriage. But the logic of its doctrines inevitably led it in due time to contend that marriage was a Church matter, a sacrament. It began by accepting the marriage forms in vogue wherever it found itself. It merely asked that the marriage contract should be hallowed with a priestly benediction—just the same procedure it demanded with reference to ordinary business contracts.

Thus it became the custom for the married couple to go to the church after the secular ceremonies had been completed, and there to receive the sacrament. In time it became the custom to celebrate the first part of the nuptial services outside the church door. Soon this was followed by the regular bridal mass inside the church. By the twelfth century the priest directed the ceremony, still beginning outside the church; and by the thirteenth he officiated throughout the ceremony and superseded entire-

ly the guardians of the couple. Until then marriage was purely a private transaction. But now after twelve centuries, ecclesiastical law was definitely established.

The full aim of the priests, however, was not attained until the Council of Trent, (1545-63) answering the Reformers, officially pronounced that, "If anyone should say matrimony is not truly and properly one of the seven sacraments of the gospel law, instituted by Christ, but an invention of man, not conferring grace, let him be anathema."

From then on private marriage was a sin; and where the priests have had the power it has been held null and void. A papal decree actually declared civil marriage and marriage in non-Catholic places of worship both sinful and void as late as 1907.

This conception of marriage as a religious sacrament has been a most potent influence throughout the centuries down to the present day and constitutes the Church's most important contribution to the history of matrimonial relations.

Holding the views of St. Paul and the Fathers as reflected in the quotations already set forth, succeeding Christian ecclesiastics labored assiduously to compel Christendom

also to accept the doctrine of the indissolubility of marriage. Their fortunes regarding this matter fluctuated and will be referred to again when we come to our discussion of Canon Law.

But what needs to be borne in mind here is that the Church continued at all times to hold firmly to the doctrines of the early leaders, many of which actually had their root in Jewish law and practice; that with reference to the sexual relation the Church's position was one of contempt and condemnation; that woman was regarded as an inferior, devilish being; that man was conceived as having dominion over her and her life; that personality was denied her; that marriage was regarded as a permissible but undesirable state, to be entered into only to avoid the sin of fornication; that even then continence was the great virtue; that salvation was the supreme object; that marriage was for life; and that divorce was forbidden.

In this connection the reader's attention may appropriately be called to Little Blue Book No. 1122, "The Degradation of Woman," by Joseph McCabe; and his larger work, "The Influence of the Church on Marriage and Divorce." On page 107 of the latter work he corroborates some of the things stated above:

If this remarkable development of marriage up to the eleventh century was entirely removed from anything like social or humanitarian considerations, we shall find it equally contemptuous of such mundane interests in the next phase. The modern plea that Christianity rendered some important social service in Europe, is quite absurdly inaccurate and anachronistic. Churchmen in those earlier ages had not the slightest regard for social interests. They had the letter of the Scripture to interpret, and when this was ambiguous—as it was in the case of divorce—they naturally interpreted it in harmony with the general asceticism of the Christian ideal. If men and women were not heroic enough to live up to it, so much the worse for them in the next world; to the misery and hardship which an indissoluble marriage brought on them in *this* world the ascetic priest was entirely insensible.

That the doctrines described above are still completely permeating the thought of the people of America, Catholic, Protestant, and Jew alike, and, therefore, affecting their outlook and blinding them to sociological implications so far as our sex and marriage problems are concerned, seems almost too obvious to require proof or argument. But in order that the case may be complete, let us see what is the official Catholic teaching in the United States today. We turn, first, to the Catholic Eycylopedia, published in 1912:

The female sex is in some respects inferior to the male sex, both as regards body and soul.

It should be emphasized here that man owes his authoritative preeminence in society not to personal achievements but to the appointment of the

Creator, according to the word of the Apostle: 'The man—is the image and glory of God; but the woman is the glory of man.'

This doctrine which has always been maintained by the Catholic Church was repeatedly emphasized by Leo XIII. The Encyclical "Arcanum," 10 February 1880, declares: "The husband is the ruler of the family and the head of the wife. The woman is flesh of his flesh and bone of his bone, is to be subordinate and obedient to the husband—."

The Church being the Divinely appointed custodian of all sacraments, it belongs to her jurisdiction to interpret and apply the Divine law of marriage.—The Church derives her power to legislate in matrimonial affairs, not from the State, but from Christ; and acts, not in sufferance, but by divine right. She recognizes the duty of the State to take cognizance of Church marriages in order to insure certain civic effects, but her jurisdiction is superior and of Divine origin.—

Let us supplement that with excerpts from a propaganda leaflet distributed by the Paulist League of New York, which reads:

The perpetuity of marriage requires that the bond shall last until death. This is opposed to every system which allows divorce. However, for sufficiently grave reasons, the Church will sanction the separation of man and wife, or what is called, in legal phraseology, "separation from bed and board." This means that the parties may be separated from each other, although neither one is free to marry another person, until death has dissolved the first marriage.

Marriage is sacred because instituted by God Himself. Marriage is sacred most of all because our Savior, Jesus Christ, elevated it to the dignity of a sacrament.

At the present time, when easy divorce threatens the destruction of the marriage bond, the Catholic Church is its great defender. She teaches,

and has always taught, that nothing but death can dissolve a valid, consummated Christian marriage.

But what about the effect of the Reformation? Did not Luther call marriage a "worldly thing" and reject the Catholic teachings?

We shall have occasion to return to this question again; but for the present it may be pointed out that what the Reformers did was to turn from the authority of the Church to that of the Bible in this as in other matters. And the result was only partly a step forward. As has so often been pointed out, the Reformation stopped too soon. It tied the civilization of its day to the dead code of Israel and hampered the humanist movement by invoking the ancient Jewish doctrines and the teachings of Jesus, Paul and the early Church Fathers. At the time of the Reformation this appeal to the scriptures as against the word of the Church was a masterly stroke. But it kept the matter in the field of theology instead of completely secularizing it; and for that mistake society is still paying.

Since the scriptures contain conflicting and ambiguous teachings on the subject of marriage and divorce, it is not surprising that when the Reformers sought to put them into practical operation, they found themselves dis-

agreeing as to what was meant. Hence, there were those who favored rigid interpretation and contended that divorce was permissible only for adultery, while some, like Luther, contended that desertion also was a scriptural ground.

The value of their work in this respect lies in the fact that they rejected the doctrine that marriage is a sacrament and taught that divorce is permissible.

But it must always be remembered that they continued to hold to the view that what was right or wrong was to be decided by theological standards. Their heritage was that of the Church against which they were rebelling. Their psychology was and remained priest-made. Their approach to the questions under discussion was devoid of any sociological perceptions or motives. They continued to think in terms of ecclesiasticism. And that is our misfortune.

CHAPTER III

ECCLESIASTICAL COURTS AND CANON LAW

From the earliest days of Christianity, it was assumed that the Church had authority to adjudicate spiritual matters at least between, or involving, its adherents. The words of Jesus as ascribed to him in Matthew XVIII were construed to mean that disagreements and grievances between Christians should be thus settled:

15. Moreover, if thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast gained thy brother.

16. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established.

17. And if he shall neglect to hear them, tell it unto the church; but if he shall neglect to hear the church, let him be unto thee as an heathen man and a publican.

Paul's word in I Corinthians VI were likewise invoked:

1. Dare any of you, having a matter against another, go to law before the unjust, and not before the saints?

4. If then ye have judgments of things pertaining to this life, set them to judge who are least esteemed in the church.

5. I speak to your shame. Is it so, that there is not a wise man among you? No, not one, that shall be able to judge between his brethren?

Bishops, synods, and councils, therefore, acted from time to time in a judicial capacity so far as disputes between Christians were concerned and in cases involving offenses of a spiritual nature. Their jurisdiction, however, extended only over Christians who submitted voluntarily.

But in the time of Constantine the Church entered on a new era in this regard as well as others. For the Emperor decreed that litigants who preferred to do so might submit secular matters to the bishops by agreement, and that in all such cases the judgments of the bishops should be enforced by the civil authorities.

During the ensuing five centuries there were various extensions and restrictions of this temporal jurisdiction; but the bishops continued to act merely as legally indicated arbitrators. There were, however, during this period many momentous trials; and an extensive body of rules and precedents was developed.

A new epoch began with Charlemagne, who decreed that any litigant might at the beginning of a suit or any time during its pendency, have it transferred to the Bishop's tribunal. The priest had now truly become a judge.

The evolution of the ecclesiastical courts

henceforth proceeded apace; and by the time of Gregory VII in the eleventh century, they were genuine tribunals with original jurisdiction, secular as well as spiritual, presided over by a regular class of professional church lawyers. The judicial function was exercised now by officials appointed for that purpose, and bearing titles varying according to locality.

In England, which mainly interests us, an extensive system of ecclesiastical courts was established; and at an early date these courts were given exclusive jurisdiction over matrimonial cases, a jurisdiction that continued until 1857. An important change in their personnel took place during the reign of Henry VIII, when the papal authority was thrown off. For laymen, versed in the "civil" law were then substituted for the former canonists.

Dickens tells us in "David Copperfield," what the ecclesiastical courts are. Steerforth, in the office of Spenlow & Jorkins, the distinguished proctors, explains to David: "A proctor is a sort of monkish attorney. I can tell you best what he is by telling you what Doctors' Commons is. It's a little, out-of-the-way place where they administer what is called ecclesiastical law, and play all sorts of tricks with obsolete old monsters of Acts of Parlia-

ment, which three-fourths of the world know nothing about, and the other fourth supposes to have been dug up in a fossil state in the days of the Edwards. It's a place that has a monopoly in the suits about people's wills, and people's marriages, and disputes among ships and boats."

Dickens also describes a number of cases before the ecclesiastical court in which Spenlow & Jorkins appeared. One was for annulment of marriage and may be worth recalling in the light of some recent decisions of the Rota, the tribunal of the Catholic Church at Rome still administering the same principle of law: "The husband, whose name was Thomas Benjamin, took out his marriage license as Thomas only, suppressing the Benjamin in case he should not find himself as comfortable as he expected. *Not* finding himself as comfortable as he expected, he now came forward and declared that his name was Thomas Benjamin, and, therefore, he was not married at all, which the court confirmed to his great satisfaction."

CANON LAW

The law administered by the ecclesiastical courts was canon law, the law of the Roman

Catholic Church embodied in the Corpus Juris Canonici. Its sources were the Bible, the writings of the Fathers, the canons of the Church Councils, the decretals of the Popes, the manuals of penance, custom, and secular legislation, especially as found in the Code of Justinian.

The first attempt to codify all of this law as it then existed, was made by Gratian, a famous teacher of canon law at Bologna. The work was published in 1148 and came to be known as the Decretum.

There were many collections and compilations prior to that time; but they were all incomplete. And it was that of Gratian that eventually formed the basis of the official Corpus Juris Canonici. To it were added compilations covering the period from its original publication to the convening of the Council of Trent, and the decrees of that Council, lasting from 1545 to 1563. Complete at any time subsequent, it includes, of course, all later papal decretums and official canons.

But what does this mean for us?

Just this—that when the American colonies were settled this canon law was officially in effect in England. The English courts held distinctly that it was taken over by the Church

of England unless specifically repealed. Lord Brougham, for instance, spoke of the "common law prevailing for 1400 years in Christian Europe" and said, "Nothing but express enactment can abrogate the common law of all Christendom before the Reformation of the English Church."

We saw in the second chapter how the doctrines of the early Church Fathers were developed and incorporated, with certain changes, into the body of official belief of the Church. Well, it is that body of belief that virtually became the canon law to be enforced by the ecclesiastical courts. Wherever, therefore, the influence of those courts is felt, there, too, is felt the power of the antiquated, theological doctrines evolved by the hierarchy of the Roman Catholic Church.

The sorry import of all this has been well expressed by Sir Henry Maine, who wrote:

> No society which preserves any tincture of Christian institution is likely to restore to married women the personal liberty conferred on them by the middle Roman law—. There are many vestiges of a struggle between secular and ecclesiastical principles, but the Canon Law nearly everywhere prevailed.—The systems which are least indulgent to married women are invariably those which have followed the Canon Law exclusively—.

Even more emphatic in his condemnation of the consequences is Havelock Ellis, whose ut-

terances on the subject are so numerous that it is difficult to limit one's quotations. In his "Sex in Relation to Society," he said:

> The Church, however, had not only made marriage a religious act; it had also made it a public act.—With the development of Canon Law the whole field of the regulation of the sexual relations, and the control of its aberrations became an exclusively ecclesiastical matter. The secular law could take no more direct cognizance of adultery than of fornication or masturbation; bigamy, incest, and sodomy were not temporal crimes; the Church was supreme in the field of sex.

Let Ellis also appraise the result of the Reformation in this respect:

> So subjugated were European traditions and institutions by this spirit (the ascetic) that even the volcanic uprising of the Reformation—could not shake it off. When Protestant States naturally resumed the control of secular affairs which had been absorbed by the Church, and rescued from ecclesiastical hands those things which belonged to the sphere of the individual conscience, it might have seemed that marriage and divorce would have been among the first concerns to be thus transferred. Yet, as we know, England was about as much enslaved to the spirit and even the letter of Canon law in the nineteenth as in the fourteenth century, and even today, English law, though no longer supported by the feeling of the masses, clings to the same traditions.

There is also a brave and discriminating young writer of our day who has dared to speak boldly on this subject, John Langdon-Davies, an Englishman. In a recent book entitled, "A Short History of Women," he has recorded conclusions that deserve to be quoted in this connection:

Whether then we judge by the utterances of the early Church writers or by the dogmas and injunctions of the early Church law, we are forced to the conclusion that among all the enemies of women, none has waged more implacable war against them than the religion which grew up and was called Christianity. It brought a blast from the desert which made all nature sterile, and we still suffer from its effects.

Yea, verily, we still suffer!

Even a standard legal work, the English and American Encyclopedia of Law, comments, "The policy of the ecclesiastical law was not so much to promote the morals and peace of the King's subjects as to exercise a church discipline for the 'good of souls.'"

To complete the record, let us quote Blackstone, the patron saint of English and American law:

The very being and legal existence of a woman is suspended during marriage, or at least it is incorporated and consolidated into that of her husband, under whose wing, protection and cover, she performs everything. So great a favorite is the female sex of the laws of England.

We are now ready to study specifically the relation of Canon Law and the decisions of the Ecclesiastical Courts to American law; and we shall see presently how, through them, religion has disastrously affected the American conception of marriage and divorce.

CHAPTER IV

AMERICAN COURTS AND CHURCHLY PRECEDENTS

The Ecclesiastical Courts of England granted no absolute divorce after 1601, but only "separation from bed and board."

There was one brief effort, however, to reform the English marriage laws. The Puritans in 1644 passed an act asserting that marriage was not a sacrament, though adding that it should be solemnized by "a lawful minister of the Word." In 1653 they passed an even more radical act leaving out the last named clause, and made marriage purely secular. The banns were to be published either in the Church or in the market place, as the parties desired; and the ceremony was to be performed by a Justice of the Peace.

The Restoration abolished this sensible act and re-introduced canon-law traditions. Thereafter for nearly two hundred years the English ecclesiastical courts administered substantially the old canon law. Divorce was unknown under the general law; and a special act of parliament was necessary to procure one in individual cases.

During the seventeenth century there were only three such applications, the first in 1669: and they were all by peers. During one hundred and seventy years none were granted except for adultery.

Now, then, the adventurous English who settled on the Atlantic Coast of America brought with them their English traditions and conceptions of law. It was thus, that the Puritan conception of marriage found root in colonial soil.

But, none of the colonies at any time had ecclesiastical courts. Hence, the only relief in matrimonial cases, with one exception, had to be granted by legislatures acting in imitation of Parliament. This power, however, was assumed only in Massachusetts, New York, Pennsylvania, and Rhode Island. The exception referred to above was the colony of Connecticut, which at an early date granted to its regular courts of law power to enter decrees of divorces.

After the colonies became independent, all the new states, except South Carolina, passed general laws vesting jurisdiction in the civil courts to grant divorces on certain stated grounds. In some instances the legislatures continued to follow the practice of the English Parliament; but eventually the constitutions prohibited this procedure.

Being just ordinary human beings, the legislators who enacted these new laws were inevitably moved by their religious prepossessions. Their point of view, therefore, was largely that of the Europe of their day, modified by a little leaven of Puritan liberalism. They permitted divorce only for adultery or for adultery and desertion, though in some instances they adopted the view of the less straight-backed of the Reformers, that there might be conduct constituting constructive de-

sertion sufficient to justify a decree on scriptural grounds.

When shortly these new laws came before the courts for construction and application, the judges, like the legislators, were naturally swayed by their religious prejudices. In addition, they were the victims of that legalism which has so frequently been the bane of social or judicial progress. They invoked, first, the doctrine that so much of the common law of England as was not inconsistent with the new constitutions and laws remained in full force and effect; and then, searching for precedents, they reached out across the Atlantic and dragged over into American law the theological doctrines of the ecclesiastical courts as expressed in their decisions in matrimonial cases.

In this wise, they brought into American jurisprudence, from the Church courts certain vicious doctrines that remain with us to the present day. In doing this, let it always be remembered, they were accepting in divorce cases the rules, principles, and decisions of a court that had not granted any divorces for over two centuries and a half. The absurdity of this action should be apparent to anyone except an American judge or lawyer.

But our courts still continue down to the present day to follow the early decisions and to repeat their very language.

Thus, in a very recent case, the Supreme Court of Missouri said:

> —The action for divorce and alimony, the defenses thereto, and the proceedings therein, are so far as suited to our day and situation, con-

trolled by the law of the English ecclesiastical courts (common law with us) as modified, changed or in some matters supplanted by our statutes. (Chapman vs. Chapman, 269 Mo. 663.)

In an earlier case the same court said that in divorce cases the courts of the state were governed by ecclesiastical court practice, "as to the substantial rights of the parties." In other words, what the rights of a husband and wife in Missouri are at the present time is to be measured by the views of a court bound by the theological doctrines of the Catholic Church of the Middle Ages, including the one that marriage was indissoluble.

That the ecclesiastical law of England was a part of the state law was held by the Supreme Court of Missouri in an old case reported in the very first volume of the reports of that court. In that case the Court decided:

The procedure in this case is not a common law or chancery proceeding, but is a proceeding sui generis, founded on the statute. But as the statute makes use of terms used in the ecclesiastical courts, where alone divorces are prosecuted in England, we think the rules of that court should govern, so far as they may be applicable to our institutions and law. (Stokes vs. Stokes, 1 Mo. 320).

Similar holdings can be found in the reports of the courts of most of the other states, from the early days of the nineteenth century down to the present time. Thus the Massachusetts Supreme Court in 1813 used virtually the same language as the Missouri court in the case first referred to above from that state. The Delaware Supreme Court in 1835 said the courts of

that state must "recognize the doctrines of the ecclesiastical courts on the subject of divorce." The Texas Supreme Court in 1852 said, "The rules and doctrines of the ecclesiastical law, so far as they are applicable, must be enforced." The Supreme Court of Maine in 1920 said divorce proceedings were "ecclesiastical in their origin." And the Nevada Supreme Court in 1922 said, "The law of marriage and divorce, as administered by the ecclesiastical courts, is a part of the common law of this country."

With this general acceptance of canon law and the practices of the ecclesiastical courts of England, the courts introduced into American jurisprudence certain specific doctrines that have resulted in immeasurable misery and evil and need now to be particularly examined.

In order that we may have these doctrines authoritatively presented to us let us quote from a decision of the Massachusetts Supreme Court:

> This court has assumed that the legislature, in conferring upon it jurisdiction to grant divorces from the bond of matrimony, although the statutes make no provision respecting connivance, collusion, condonation, and recrimination, intended to adopt the general principles which have governed the ecclesiastical courts of England in granting divorces from bed and board, so far as those principles are applicable and found to be reasonable. (Robbins vs. Robbins, 140 Mass. 528).

Here, then, are four legal doctrines (it is humiliating to recognize them as principles) that have been brought into American law from the ecclesiastical courts—condonation, recrimi-

nation, connivance, and collusion. In some states they have now been adopted by statute, but regardless of that, as the Massachusetts Supreme Court said, they are accepted and enforced.

CONDONATION

The first of the four doctrines named, condonation, means in law just what it means in everyday thinking, namely, forgiveness. The occasion for its application arises when a party suing for divorce sets up as a ground a certain offense which the other party contends has been forgiven or condoned. Thus, if the wife is accused of adultery, and it is shown that the husband, knowing of her guilt, continued to cohabit with her and overlooked her breach of marital vows, he cannot afterwards obtain a divorce because of that particular case of infidelity. Condonation applies also to other causes of divorce. Thus, cruelty may be condoned, or drunkenness.

Here again the courts specifically refer to the Canon Law as the source of the doctrine. Referring, for instance, once more to the Missouri Supreme Court, we find it saying: "The doctrine as to condonation comes from the ecclesiastical law and not from the Missouri statute." And the Supreme Court of Texas similarly stated, "Although the statute is silent, the doctrine of the ecclesiastical courts will be applied to cruelty as well as adultery." (Wright v. Wright, 6 Tex. 29.)

It has been held that it applies to all charges of matrimonial misconduct recognized by law.

In effect it is the blotting out of the offense.

Thus, a wife who, after leaving a husband because of his cruelty and returning to live with her mother and brothers, received frequent visits from her husband and submitted to sexual intercourse, was held to have condoned the offense of mistreatment. (Shirley v. Shirley, 87 Ark. 175.)

The horrible results of the application of the doctrine are illustrated in the record of a case decided in Louisiana in 1907. The husband brought suit on the ground of his wife's infidelity and in support of his charge proved that she had contracted syphilis from some other party than himself. They had lived apart for over three years when the action was begun; but because the evidence showed that they had lived together for over a year after the husband knew that his wife had the disease, he was held to have forgiven the act of adultery through which she became infected. (Lewis v. Hurry, 44 So. 856.)

In another case in New Jersey, it was said that where the wife, having discovered her husband's adultery, moved her personal belongings into a separate room, where she slept with the children, but, knowing of no way of making a living, remained in the same house with her husband and did the usual housework for a period of seven months and several times gave herself in sex embraces to her husband when he entered her room at night over her protest, doing so as she testified, because she was in mortal fear of him, she had neverthe-

less condoned his offense and was not entitled to a decree on that ground. (Leech v. Leech, 89 Atl. 51.)

A continuing offense, however, may not be condoned, as the doctrine applies only to past offenses. So the Maine Supreme Court decided in a case of impotency. And the Kentucky Supreme Court held the same with reference to habitual drunkenness existing at the time of marriage.

RECRIMINATION

While the results of the application of the doctrine of condonation may be and often are very serious, as shown by some of the cases cited, those following the application of the doctrine of recrimination are vastly more far-reaching, though not nearly equal to those flowing from the application of the doctrine of collusion.

Recrimination means, in every-day parlance, counter-charge—"You are another!" It means virtually the same thing in legal nomenclature. In other words, if a plaintiff in a divorce suit charges the defendant with infidelity, and the defendant in turn charges the plaintiff with the same offense, no divorce will be granted if the evidence tends to show that both are guilty. The application of this beneficient rule has the effect, of course, of tying together irrevocably two people who have each given grounds for divorce that the law would recognize as the basis of relief were they proven against one instead of both.

The doctrine is explained by Schouler, one of the best of the law writers, in his work on "Marriage, Divorce, Separation, and Domestic Relations"; and what is of even more interest, he definitely recognizes its genesis:

> So that, *following the Mosaic and Canon Law*, the courts of matrimonial jurisdiction, plainly disinclined as they always were to rupturing the marriage tie, have consistently held that the spouse who has violated his or her marriage vows is in no position to complain that the other has done the same. (Italics, the writer's.).

An example of the stringency with which the courts apply this rule may be seen in a case decided by the Supreme Court of the State of Washington about twenty years ago. That state has a statute providing that a divorce may be granted to either husband or wife, "for any cause deemed sufficient where the court shall be satisfied that the parties can no longer live together." In the case referred to, the trial court found as a matter of fact that "such estrangement (between the husband and wife) is so great that the parties cannot henceforth peaceably live together." Yet the higher court held that a divorce would be denied, "where it appears that their failure to live together is due to their own obstinacy, and that in regard to the quarrels and disagreements which caused the estrangement, both parties were equally at fault." (Colvin v. Colvin, 15 Wash. 490.)

Farther than that a group of legalists in robes can hardly go to emasculate the plain language of the statute and to deny relief to

an unhappy couple, "following the Mosaic and Canon Law."

The courts of Washington, however, do not stand alone in this respect. Thus, we find an interesting case in Texas, where in a suit for divorce instituted by the wife on the ground of cruelty, it appeared in the evidence that the husband and the wife had several altercations, "in one of which she knocked him down and beat him severely," and the court held that the evidence showed recrimination, preventing the wife from obtaining a divorce. (Beck v. Beck, 63 Texas, 34.)

This sounds very much like a hint to husbands. Let them take a beating or two, and wives must remain wives.

The Arkansas Supreme Court, in a case decided in 1890, illustrated how humane the law can be. The evidence showed that "a much neglected wife, goaded on by the gibes of the husband's children by a former marriage and aggravated by his assumed superior education, had been guilty of ill-temper and petulance, settling at times into morbid bad humor and breaking out in violent conduct toward her step-children and prompting the use of unclean language to them and to her husband"; and the court held that husband and wife were about equally guilty and declined to grant relief to either. (Cate v. Cate, 53 Ark. 484.)

The Illinois Court of Appeals in 1893 held that where a wife had filed a bill for separation from bed and board and her husband had filed a cross-bill asking for divorce, and the evidence

showed that he was "a drunken, worthless husband, at times cruel, and that he had no property to contribute to the wife's support, but that the wife gave the husband cause, by her improper conduct, to gravely complain," both bills were properly dismissed and all relief denied. (Howard v. Howard, 47 Ill. App. 453.)

The doctrine is, however, most frequently applied in cases of adultery; and in any state in the Union, except South Carolina, the courts, required by law to grant relief to one spouse when the infidelity of the other is proven, will deny it whenever both are shown to be guilty. No other marriage, therefore, is so absolutely destined under American law to last "until death do them part" as one where both husband and wife have committed the one offense recognized even by practically all religionists except the Catholics, as ground for relief.

But we need not speculate about the reasoning of the courts. We have in fact numerous decisions showing just how Christ-like it is possible for Christian judges, applying the doctrines of the Christian ecclesiastical courts, to be. Thus, in 1819, a New York Chancellor declared that an adulterous wife and an adulterous husband were "suitable and proper companions for each other." And the North Carolina Supreme Court in 1875, passing on a case in which the wife had brought suit on the ground of the husband's adultery, said, with proper Christian horror, "We can only regret that she afterwards committed the same sin (sic). Our conclusion is that the husband and wife are two miserable wretches, and the case

is too disgusting to be longer entertained by this court." (72 N. Car. 530).

But the terrible joke of it all is that the doctrine of recrimination supposed to have been incorporated in the canon law as a part of the Roman law, did not under Roman law apply to divorce or separation cases at all. It was invoked only in cases involving property rights of husbands and wives.

CONNIVANCE

Connivance is the doctrine that the party seeking the divorce will be denied a decree if he has consented, expressly or tacitly, to the misconduct set up as the ground of relief. Thus, if the husband has given his consent, either by words or action, to his wife's infidelity, any application for divorce he may make based on the acts to which he consented will be futile.

Connivance, it will be seen, is the act of one.

A typical case is one where the husband, having reasons to suspect his wife of an inclination for illicit relations with a colored chauffeur neither discharged the chauffeur nor warned his wife, but instead absented himself from home so as to facilitate matters for them and then placed detectives in the house to obtain evidence of their misconduct. It was held that by this course of action he had connived at his wife's adultery and could not base a complaint for divorce on her default. (Sargent vs. Sargent, 92 N. J. Eq. 703).

It has frequently been held by the courts that the use of a spy to mislead the frail spouse constitutes connivance. Thus, in an Iowa case, adultery with a man employed by the husband to test the wife's virtue, was held not to entitle the husband to a decree. (May vs. May, 108 Iowa 1).

And in New York, where no ground except adultery avails an unhappy partner, unless he is willing to wait five years with desertion as a cause, the courts have frequently decided against evidence obtained by detectives. So in a case where the husband used a detective and the latter hired an assistant who spent money to entertain the wife and later took her to a house where the alleged offense was committed, the court refused to grant a decree, holding that the husband had agreed to the wife's misconduct. (McAllister vs. McAllister, 137 N. Y. Sup. 833).

It is apparent that this solicitude is due to the traditional prejudice against divorce by agreement of the parties and to the accepted doctrine that no divorce can be granted unless one party or the other is branded with the stigma of guilt, regarding which more will be said below.

So far do the courts go in enforcing this rule that they hold that if a party has once connived at a wrong by the other, such conduct precludes any complaint because of later acts of the same nature. For example, taking the New Jersey case cited above, should the wife be guilty of later offenses either with the negro

chauffeur or with some other man, the husband could not bring an action based upon any such subsequent act. The result is, of course, to make the marriage indissoluble. But at what cost!

The vileness of this rule has frequently been recognized by the courts, but with true legalistic reasoning, they have followed precedent and been satisfied to indulge in such Christian homilies as this: "It is a very harsh rule, to say the least about it, and the only theory upon which it can be supported is that the husband who consents to an act of adultery of his wife has fallen so low in his moral nature as to be forever unable to repent and reform." (Viertel vs. Viertel, 99 Mo. App. 710).

It may, however, comfort some reader to know that no less august a body than the Supreme Court of Illinois has decided that for a husband to bring home *beer* does not mean that he has consented that his wife may become a habitual drunkard through the use of *whiskey*.

COLLUSION

Collusion, the most vicious of the doctrines inherited from the ecclesiastical courts, is the act of two, the husband and the wife together. It is defined in a standard legal work as, "a corrupt agreement between husband and wife whereby one of them, for the purpose of enabling the other to obtain a divorce, commits a matrimonial offense, or whereby for the same purpose evidence is fabricated of an of-

fense not actually committed, or evidence of a valid offense is suppressed." (Corpus Juris).

The gist of the matter is a desire on the part of both parties for a divorce and acts by them to facilitate the obtaining of one. It is the condemnation of anything in the nature of divorce by mutual consent. As another authority expresses it, collusion exists in the eyes of the law when there is "mutual consent of the parties to defraud or impose upon the court by agreeing to make a false case, or consenting to one or the other committing some act upon which an action can be founded, or agreeing that one or the other may get a divorce, when no real injury has been done either of them." (Keezer).

"An agreement between husband and wife," explains another law writer, "that she shall bring suit for divorce and he will not defend it is within the definition of collusion."

And the Supreme Court of Michigan has stated the doctrine succinctly in these words: "The statute is based on public policy, which forbids the annulment of the marriage contract by the agreement of the parties." (Thompson vs. Thompson, 70 Mich. 62).

How the doctrine actually operates in practice was shown in an Illinois case. In that instance the summons was served on the wife while she was in the office of her husband's attorney. On the same day she authorized another lawyer to appear for her and to consent to a default. The husband's attorney testified that the wife came to him first, pre-

senting a paper signed by her husband and authorizing her to obtain a divorce. The attorney advised her, after going into the facts with her, that she had no ground for an action but that her husband did. Thereupon she left and soon afterwards sent her husband to the lawyer, when suit was entered in his name. The evidence submitted indicated that the husband did have good grounds for an action and that the wife did not; but in the light of the facts as stated, the court held that the husband's bill was properly dismissed because of the collusion of the parties. (Belz vs. Belz, 33 Ill. App. 105).

Even the Supreme Court of the United States has recognized this doctrine, saying:

> Other contracts may be modified, restricted, or enlarged, or entirely released upon consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress. (Maynard vs. Hill, 125 U. S. 190).

The Belz case described above illustrates pretty well how this antiquated, theological doctrine operates in every-day life. A given couple, living in this modern age when men and women think more of natural human rights than they do of the anathemas of priests or the sanctity of out-worn legal restrictions, will find a way around such an obstacle. Too civilized to descend to vulgar

quarrels and altercations and too jealous of their own self-respect, they may refuse to stoop to any of the acts that the law recognizes as ground for divorce. And yet they may have become convinced that it is no longer right from any standpoint, except that of traditional morality, that they should continue to live together as husband and wife. They may have come to realize that they have grown apart—that common interests and mutual affection have alike disappeared. They may or they may not understand how they have come to this pass. Often the causes are too elusive for us to grasp, even when the most scientific intelligence is brought to bear on the problem. But the fact exists.

Now, as intelligent people, what are they to do? Shall they supinely submit and continue to live together as "friends," refraining from sexual relations both with each other and others, living lives of priest-and-nun-like chastity? Shall each seek satisfaction elsewhere? Or shall they continue a life of make-believe and virtually be guilty of mutual prostitution?

DELINQUENCY

Here the law introduces another doctrine, implicit in much that has been said, namely, that there must be a culprit—before there can be a divorce one party or the other to the union must be branded with the stigma of guilt.

Early cases even held that "regulations on

the subject of divorce" were "parts of the Criminal, rather than the Civil, Code," (Barber vs. Root, 10 Mass. 260); or as the Texas Supreme Court expressed it more accurately, "A suit for divorce is in its nature a quasi-criminal proceeding, though not brought in the name of the state." (Stafford vs. Stafford, 41 Texas 111).

Keezer in his "Marriage and Divorce," a recognized legal authority, says flatly, "The right to a divorce contemplates a guilty party and an innocent party."

Havelock Ellis has well said, on this point:

> But in the marriage relationship, as in other relationships, it is only in a very small number of cases that one party stands towards the other as a criminal, even a defendant. This is often obvious in the early stages of conjugal alienation. But it remains true to the end. The wife commits adultery and the husband as a matter of course assumes the position of plaintiff. But we do not inquire how it is that he has not so won her love that her adultery is out of the question; such inquiry might lead to the conclusion that the real defendant is the husband. And similarly when the husband is accused of brutal cruelty the law takes no heed to inquire whether in the infliction of less brutal but not less poignant wounds, the wife also should not be made defendant. There are a few cases, but only a few, in which the relationship of plaintiff and defendant is not a totally false and artificial relationship, and immoral legal fiction. In most cases, if the truth were known, husband and wife should come side by side to the divorce court and declare: "We are both in the wrong: we have not been able to fulfill our engagements to each other; we have erred in choosing each other." The long reports of the case in open court, the mutual recriminations, the detectives, the servant girls and other witnesses,

the infamous inquisition into intimate secrets—all those things, which no necessity could ever justify, are altogether unnecessary.

Because of this doctrine that the law demands a culprit and the doctrine of collusion, the imaginary couple whose condition we are discussing, find themselves in a trap that opens only inward. Something has happened to them for which they are not responsible. Their love has died. But the law says, "That is your misfortune. As your punishment for having let it die, you are sentenced to live together falsely as husband and wife for the remainder of your days."

But they are not minded to submit. Hence in due time legal grounds are fabricated. If the law will not grant "relief from misfortune," as the law in Norway so aptly phrases it, then grounds must be made. And they are. If they live in a state where the law is favorable, the husband may leave his wife, later writing her a letter saying he does not intend ever to live with her again; and at the expiration of the time fixed by the statute, she may obtain a decree on the ground of desertion. Or, if they live in New York, he may even permit himself to be found under compromising circumstances in a hotel room with some woman paid to be named as co-respondent in the suit which is to follow.

Thus is Justice circumvented, but its face is saved.

However, look at the miserable, shameful consequences flowing along this stream of

medieval Church doctrine down into modern American life. There is fabrication of evidence, there is perjury, there is general "framing-up" of cases, there is imposition on the court, there is misuse of the machinery of justice, there is general hypocrisy, and with it all there is the ever increasing disrespect for the law of the land and the courts that sit in judgment, to say nothing of the crushing of the human spirit.

CHAPTER V

MINDS IN SUBJECTION

As mere facts, these things are known to all members of the bar and to all judges on the bench. But lawyers and judges are bound by the chains of tradition and precedent. And few of them ever think of freedom in this connection as in any wise desirable. So terrible is the hold that the religious way of thinking has even on men who themselves are not consciously religious.

Speaking of divorce from the standpoint of ethics, Lecky wrote in his "History of European Morals," "There is probably no other branch of ethics which has been so largely determined by special dogmatic theology, and there is none which would be so deeply affected by its decay."

What the elder theologians by whose chains we are still bound could not see, and what lawyers, judges, and legislators in our day will not, is that divorce is the result, and not the cause of the break-up of the family. Divorce in itself, therefore, is not an evil but blessed relief from pain—a remedy applied to a pathological condition of marriage.

Whether the balance would be on one side of the account or the other, could we cast up on the one hand all the consequences of divorce and on the other all the consequences

of lack of it where people continue to live together when mutual regard and happiness are gone, no one knows, for we have no data. But this one thing we do know, if we recognize the bearing of the facts outlined above: We will never obtain the data, nor appraise them scientifically until we are intellectually, socially, ethically, and legally free.

The whole present system is wrong. There must be a new approach, new principles, new practices, new institutions.

First, the sacrament idea of marriage must be completely scrapped. Second, the taboo must be removed from the subject of sex; and the doctrine that sex is sin must be discarded. Third, the doctrine of chastity as something nobler and more elevating than clean sex relations must be sent to the limbo of out-worn theological dogmas. Fourth, the doctrine of the indissolubility of marriage must follow. Fifth, American jurisprudence must be emancipated from every vestige of canon law and ecclesiastical court precedent. And sixth, we must weed out of American life and thought, the religious way of thinking of marriage and divorce.

In short, we must cast off the bonds of theology and, with free minds, approach the problems of our day in a humanistic and a sociologic spirit, bringing to bear upon them the best scientific light and knowledge of our time.

Let us quote once more from that gifted, scholarly, and masterly writer in this field, Havelock Ellis:

It is lamentable that at this period of the world's history, nearly two thousand years after the wise legislators of Rome had completed their work, it should be necessary to conclude that we are today only beginning to place marriage on a reasonable and humane basis. I have repeatedly pointed out how largely the Canon law has been responsible for this arrest of development. One may say, indeed, that the whole attitude of the Church, after it had once acquired world domination, must be held responsible.—But when the Church attained temporal power—all the claims of reason and humanity were flung to the winds. —The vitality was crushed out of the most central human institutions, and they are only today beginning to lift their heads afresh. (Sex. in Relation to Society, p. 503).

American writers, at least in legal circles, have taken cognizance of the fact that ecclesiastical doctrines have come to be the very warp and woof of our divorce law; but few have seen, or admitted that they saw, as Ellis so clearly has, the truth that this hold of the doctrines of the Canon law on modern English and American law has retarded social legislation, and social and legal progress, by two thousand years.

There will be no solution of our 'sex and matrimonial problems—there will not even be a proper approach to their settlement—until a number of intelligent people with enough force and influence to overthrow the present system, come to see and believe this fact.

We will begin to solve these problems only if and when we destroy utterly the blight of religion now lying so somberly on our law and on our social order.